ORIGINAL

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

UNITED TRANSPORTATION UNION, ILLINOIS STATE LEGISLATIVE BOARD Petition for rulemaking to require safe walkways for railroad employees in the state.	)	T03-0015

MOTION FOR LEAVE TO FILE JOINT POST-HEARING BRIEF OF RESPONDENTS NORFOLK SOUTHERN RAILWAY COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.

Norfolk Southern Railway Company ("Norfolk Southern") and Illinois Central Railroad Company, et al. ("Illinois Central"), move the Illinois Commerce Commission to permit the filing of their Joint Post-Hearing Brief of Respondents Norfolk Southern Railway Company, Illinois Central Railroad Company, et al. In support of this motion, Norfolk Southern and Illinois Central state as follows:

1. On February 18, 2003 United Transportation Union filed its Petition by the Illinois State Legislative Board, United Transportation Union, For a Rulemaking Covering Safe Walkways.

2. The Honorable Judge June Tate held an initial hearing on the matter on April 22, 2003.

3. Union Pacific Railroad Company and the Burlington Northern and Santa Fe Railway Company filed their Response to the Petition for Rulemaking to Require Safe Walkways for Railroad Employees in the State on July 14, 2003.

4. On July 15, 2003, CSX Transportation, Inc. filed its Response of CSX Transportation, Inc. to United Transportation Union's Petition for a Rulemaking to Require Safe Walkways for Railroad Employees in the State.

5. Manufacturer's Railway Company filed its Response to United Transportation Union's Petition for a Rulemaking to Require Safe Walkways for Railroad Employees in the State on August 28, 2003.

6. On September 30, 2003, Norfolk Southern Railway Company, Illinois Central Railway Company, Grand Trunk Railroad Western Railroad Incorporated, Chicago, Central & Pacific Railroad Company, Wisconsin Central Ltd., and Wisconsin Chicago Link Ltd. filed their Joint Response to United Transportation Union's Petition for a Rulemaking Covering Walkways.

7. The Honorable Judge June Tate held a hearing at the Illinois Commerce Commission on October 2, 2003.

8. After the hearing, the United Transportation Union filed its Brief in Response to Brief of the Norfolk Southern Railway Co., et. al. on October 20, 2003, and addressed certain evidence presented at the hearing.

9. The Norfolk Southern and Illinois Central seek to file a Joint Post-Hearing Brief of Respondents Norfolk Southern Railway Company, Illinois Central Railroad Company, et al. Neither party has had the opportunity to comment upon the evidence presented at the October 2, 2003 Illinois Commerce Commission Hearing.

10. The Norfolk Southern and the Illinois Central believe an additional brief would assist Judge Tate and the Illinois Commerce Commission in considering United Transportation Union's Petition for Rulemaking Governing Walkways.

WHEREFORE, Norfolk Southern and Illinois Central request leave to file its proposed Joint Post-Hearing Brief of Respondents Norfolk Southern Railway Company, Illinois Central Railroad Company, et al. attached hereto as Exhibit A.

Dated: October 30, 2003

Respectfully submitted,

Norfolk Southern Railway Company

By: _____
One of its Attorneys

Respectfully submitted,

Illinois Central Railroad Company,
Grand Trunk Western Railroad
Incorporated, Chicago, Central &
Pacific Railroad Company,
Wisconsin Central Ltd., and
Wisconsin Chicago Link Ltd.

By: _____ /s/ CC
One of its Attorneys by permission

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

UNITED TRANSPORTATION UNION, ILLINOIS STATE LEGISLATIVE BOARD Petition for rulemaking to require safe walkways for railroad employees in the state.	)	T03-0015

NOTICE OF FILING

TO: SERVICE LIST

PLEASE TAKE NOTICE that on this date I have forwarded for filing with the Illinois Commerce Commission, 527 East Capitol Avenue, Springfield, Illinois 62701, the attached Motion for Leave to File Joint Post-Hearing Brief of Respondents Norfolk Southern Railway Company, Illinois Central Railroad Company, et al., in the above captioned matter.

DATED this 31th day of October, 2003

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One of the Attorneys for
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STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

UNITED TRANSPORTATION UNION, ILLINOIS STATE LEGISLATIVE BOARD	)	
Petition for rulemaking to require safe walkways for railroad employees in the state	)	T03-0015

JOINT POST-HEARING BRIEF OF RESPONDENTS NORFOLK SOUTHERN RAILWAY COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.

This matter is about a proposed rule that, if adopted, will bring nothing but trouble to the Commission and to that substantial segment of the railroad industry operating in Illinois. The Petitioner has crafted a rule that is at once beyond the scope of the Commission's authority, lacking in justification, at odds with its stated purpose, and practically unworkable. The Commission should decline the Petitioner's invitation to regulate a subject that is, in any event, best left to the individual railroads and their employees.

I. THE COMMISSION DOES NOT HAVE THE POWER TO ADOPT THE REGULATION PROPOSED BY THE PETITIONER.

The rule proposed by the Petitioner would require railroads operating in Illinois to construct and maintain walkways adjacent to certain types of railroad tracks. Walkways covered by the rule would have to satisfy a number of standards, including standards for slope, width, and the size of surface material. But imposing such a regulation on railroads is beyond the Commission's power. Not only would the rule be preempted by

Federal law, it would also exceed the authority delegated to the Commission by the Illinois General Assembly.

A. The Proposed Rule would be Preempted by Federal Law, which already Regulates the Track Support Structure.

The Federal Railroad Safety Act of 1970 (the "FRSA") provides that "[l]aws, regulations and orders related to railroad safety...shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106 (2003). State laws, regulations, or orders related to railroad safety are invalid to the extent the Secretary of Transportation (the "Secretary") "prescribes a regulation or issues an order covering the subject matter of the State requirement." The Supreme Court of the United States has interpreted this phrase to mean that the Secretary's regulations must "substantially subsume," not merely "touch upon" or "relate to," the subject matter of the state law for preemption to apply. *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664 (1993). The FRSA leaves a role for state regulation of railroad safety where "necessary to eliminate or reduce an essentially local safety hazard," but only if the state law "is not incompatible with a law, regulation, or order of the United States Government; and does not unreasonably burden interstate commerce." 49 U.S.C. § 20106 (2003).

By any standard, the Secretary has promulgated regulations covering the subject matter of the proposed rule. 49 C.F.R. § 213.03 (2003) provides:

> Unless it is otherwise structurally supported, all track shall be supported by material which will –
>
> (a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;
> (b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails;

(c) Provide adequate drainage for the track; and
(d) Maintain proper track crosslevel, surface and alinement [sic].

Clearly, the Federal Railroad Administration ("FRA") regulates the structure supporting railroad track. As demonstrated time and again at the hearing, the "subject matter" of the Petitioner's proposed rule includes the track support because any regulation of the walkway is necessarily regulation of the track support structure. Joseph Lynch, a witness with 50 years of experience in the railroad industry, Illinois Commerce Commission Hearing, T03-0015, Tr. 178-179, Oct., 2, 2003 (hereinafter "Hearing Tr."), explained:

> Q. Can you tell us, Mr. Lynch, whether walkways, which is what these rules purport to address, are part of the structure of a railroad track?
>
> A. Yes, I can. Any time that you put any type of structure or add anything to the railroad road bed, it becomes a part of that structure. The railroad road bed is comprised of two specific sections; the superstructure which covers the ties, the rail, and the substructure, which is comprised of the track ballast, the sub ballast and the sub grade.
>
> Q. All right. Can you tell us, Mr. Lynch whether the ballast itself that is used on a walkway is part of the track structure?
>
> A. It is a very definite part of the track structure.

Hearing Tr. 185-186. Mr. Lynch went on to describe in some detail how a walkway designed to the specifications set forth in the proposed rules might interfere with drainage of the track support structure and lead to unsafe conditions, even derailments. Hearing Tr. 190-193; *see also* Norfolk Southern Ex. 5.

James Gearhart, Chief Engineer Program Maintenance for Norfolk Southern, a Class 1 rail carrier, agreed:

> Q. All right. First of all, can you tell us whether walkways which purport to be governed by Exhibit 18 or Exhibit 16 of the proposed rules contained in there are part of the structure of the railroad track?

A. Yes. The walkway is definitely a part of the track structure because it all interacts together. Your walkway – your material in your walkway is going to be the same material basically that you have in your track structure.

Q. And when you say that the material and the track structure all interacts together, does that include the ballast that a walkway might be constructed on?

A. That's correct.

Q. So do you as a railroad engineer regard ballast that is used on a walkway as part of the track structure?

A. Yes, sir.

Hearing Tr. 224.

The evidence that walkways are part of the track structure was uncontested. In fact, the walkways depicted on the drawings attached to the original Petition clearly show that they are part of the ballast support for the track. Petitioner's Exhibit 16. While the Petitioner's sole witness, a former switchman and passenger conductor, suggested that the proposed rule would not run afoul of the Federal ballast regulations because it did not necessarily require ballast to be used as a walkway surface (Hearing Tr. 68-69), the witnesses who maintain track structures as part of their job duties agreed that as a practical matter railroad walkways consist of the material that supports the track, i.e., stone ballast.

Courts that have recognized this inescapable truth of railroad engineering have held that state walkway rules are preempted by the FRSA. *Missouri Pac. R.R. Co. v. Railroad Comm'n of Texas,* 948 F.2d 179 (5th Cir. 1991) (hereinafter "*MoPac II*"); *Missouri Pac. R.R. Co. v. Railroad Comm'n of Texas,* 833 F.2d 570 (5th Cir. 1987) (hereinafter "*MoPac I*"); ; *Black v. Seaboard Sys. R.R.,* 487 N.E.2d 468 (Ind. Ct. App.

1986); *Norfolk and Western Ry. Co. v. Burns,* 587 F. Supp. 161 (E.D. Mich. 1984). The District Court in the *MoPac* cases specifically found that "the body of material used to support the walkway would have to adjoin the roadbed in such a way that it would be integrated with it and, in essence, merely become an extension of it." *MoPac II,* 948 F.2d at 183. The District Court in *Burns* noted:

> that what is referred to loosely as a walkway is not necessarily what one unfamiliar with railroading operations might conjure up to be a walkway. We are not talking about clearly-defined areas. They are not delineated by markings, fencings, railings, anything of that nature....
>
> Thus, to the degree, for example, that the State would attempt to require some specific kind of surface on the walkways...or would attempt to tell the railroad what kind of ballast they must cover the exposed end of the railway ties with, this would all be construed by this court to be within the area that is preempted. This would not only include an affirmative request of the State, for example, such as to blacktop the walkways, but would also preclude the State from complaining of generally poor surface conditions such as a muddy walkway or a stony walkway.

587 F. Supp. at 170. Citing *Burns,* an Indiana Court of Appeals found that "[w]alkways are part of the track structure and rail system that in general present an area preempted by the Federal Railroad Administration, and they are immune from further regulation by state agencies." *Black,* 487 N.E.2d at 469.[1]

The Petitioner criticizes these decisions on the grounds that all of them were decided before *Easterwood.* Petitioner's Response Brief at 13-14. Ironically, two of the

[1] Contrary to the Petitioner's claim, the *Black* case was not "effectively overruled" by the decision of a Federal court in *Grimes, infra. See* Petitioner's Response Brief at 13. Lower Federal courts do not "overrule" state courts in our Federalist system. *See Younger v. Harris,* 401 U.S. 37, 44 (1971). Furthermore, as noted below, the court in *Grimes* ignored the Supreme Court's command in *Easterwood* to avoid comparing the purposes of the Federal and state laws for purposes of determining whether they "cover" the same subject matter. Finally, Grimes involved the application of FRSA preemption to a claim arising under the FELA rather than a direct challenge to a state law. The *Grimes* court acknowledged a special reluctance to apply FRSA preemption to a claim arising under the FELA ("There is also nothing in the language or legislative history of any enactment, including FRSA, that indicates the serious purpose of undermining the basic core of FELA and its essential purposes"). 116 F. Supp. 2d at 1003.

three decisions cited by the Petitioner in support of its proposed rule also were decided before *Easterwood, Southern Pac. Transp. Co. v. Public Utils. Comm'n,* 820 F.2d 1111 (9th Cir. 1987); *Illinois Gulf Central R.R. Co. v. Tennessee Pub. Serv. Comm'n*, 736 S.W.2d 112, 116 (Tenn. Ct. App. 1987), and the third ignored one of its central lessons. *See* discussion of *Grimes v. Norfolk Southern Ry. Co.,* 116 F. Supp. 2d 995 (N. D. Ind. 2000), below. But in any event, the results in the *MoPac* cases, *Burns,* and *Black* hold up well under the Supreme Court's analysis in *Easterwood.* After all, if walkways are made up of the material that supports a track, then surely a Federal regulation setting forth track support standards "substantially subsumes" the subject matter of a state rule regulating walkways. This is especially true where, as in the case of the rule proposed by the UTU, the state regulation sets a limit on how large walkway surface material can be, and further defines the slope of the walkway surface. Because the walkway surface *is entirely comprised of the track support material,* such a rule would necessarily regulate the size of the material supporting the track. Any limit on the slope of the walkway imposes a limit on a railroad's ability to ensure adequate drainage of the track support structure, which it is required to do by the FRA. *See* 49 C.F.R. § 213.03(c) (2003); Hearing Tr. 188-189.

In contrast, the cases relied upon by the Petitioner do not fare well under *Easterwood.* All of these decisions contain the same fundamental flaw – they look at the *purposes* of the Federal regulation to decide whether it "covers" the subject matter of the state law. The District Court in *Southern Pac.* concluded that federal regulations did not preempt California walkway rules because, "[s]tate and Federal regulations...cannot be held to cover the same subject matter unless they address the same safety concerns....The [Federal] ballast regulations...are designed to insure that tracks have adequate support.

The regulations dealing with vegetation on or near roadbeds are designed to insure that employees can perform necessary maintenance work. No FRA regulation addresses the concern that employees have a safe working environment near railroad tracks." *Southern Pac. Transp. Co. v. Public Utils. Comm'n,* 647 F. Supp. 1220, 1225 (N.D. Cal. 1986), *aff'd per curiam, 820 F.2d 1111 (9th Cir. 1987).* Similarly, in *Grimes, supra.,* the court declined to apply FRSA preemption to an FELA claim, declaring that "[t]he [Federal track] regulations are directed toward creating a safe roadbed for trains, not a safe walkway for railroad employees." 116 F. Supp. 2d at 1002-1003. In *Illinois Gulf Central, supra.,* the court cited *Southern Pac.* for the proposition that "State and federal regulations...cannot be held to cover the same subject matter unless they address the same safety concerns." 736 S.W.2d at 116.

The U. S. Supreme Court rejected precisely this rationale in *Easterwood.* One of the claims in that case was that the defendant railroad breached its common law duty to operate its train at a safe rate of speed at a grade crossing, despite the fact that the train was traveling within FRA-prescribed track speed standards set forth at 49 C.F.R. § 213.9. The railroad claimed that the FRA regulations governing maximum speeds over certain classes of track barred the plaintiff's state law negligence claim. The plaintiff, like the Northern District of California, the Northern District of Indiana, and the Tennessee Court of Appeals, argued that because the purpose of the Federal regulations was different from the purpose of the state law, there was no preemption under the FRSA. The Supreme Court was not persuaded:

> [Section] 213.9 should be understood as covering the subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings. Respondent nevertheless maintains that preemption is

> inappropriate because the Secretary's primary purpose in enacting the speed limits was not to ensure safety at grade crossings, but rather to prevent derailments. *[The FRSA] does not however, call for an inquiry into the Secretary's purposes, but instead directs the courts to determine whether regulations have been adopted that in fact cover the subject matter of train speed.*

507 U.S. at 675 (emphasis added). The Petitioner's contention that "the fact that the federal regulations may not have the same purpose can also show that the regulations do not `substantially subsume' the subject matter" of the state law is flatly contradicted by *Easterwood*, not supported by it. Petitioner's Response Brief at 13.

The Petitioner also makes mention of a rulemaking termination decision in 1977 in which the FRA declined to issue a rule requiring railroads to construct walkways on bridges and trestles, a subject that is clearly beyond the scope of the Petitioner's proposed rule. But even if, as the Petitioner appears to contend, the FRA believed in 1977 that a nation-wide walkway rule is not appropriate, it does not follow that state walkway rules will automatically survive FRSA preemption. In fact, the Sixth Circuit concluded from the very same termination decision that the FRA's *refusal* to enact bridge walkway rules preempted Ohio rules governing walkways on bridges. *Norfolk and Western Ry. Co. v. Pub. Util. Comm'n*, 926 F.2d 567 (1991).[2]

[2] The Petitioner also criticizes the Respondents' citation to three recent decisions by the Seventh Circuit in their Response to the Petition. *Michigan Southern R.R. Co. v. City of Kendallville*, 251 F.3d 1152 (2001); *Waymire v. Norfolk and Western Ry. Co.*, 218 F.3d 773 (2000); and *Burlington Northern and Santa Fe Ry. Co. v. Doyle*, 186 F. 3d 790 (1999); *see* Petitioner's Response Brief at 14. The Respondents readily concede, as they did in their Response, that these decisions do not involve the application of FRSA preemption to state walkway rules. *See* Joint Response Brief at 7. These cases demonstrate, however, that the Seventh Circuit readily applies FRSA preemption where state law sufficiently overlaps federal rail safety requirements. Contrary to the Petitioner's claim, the Respondents did not misstate the holding of the *Doyle* case in their Response. *See,* Petitioner's Response Brief at 14. The Respondents correctly noted that a *portion* of a Wisconsin law mandating locomotive crew sizes (specifically, that portion of the law dealing with hostling and helper operations) was invalidated by the Seventh Circuit on FRSA preemption grounds. *See,* Joint Response Brief at 7.

However hard the Petitioner might try to characterize its proposed rule as merely dealing with "walkways" as if walkways existed quite apart from the structures that support them, the reality is that the two cannot be separated. As numerous courts and several witnesses who have appeared before this Commission have recognized, regulation of one is regulation of the other. Because the Commission cannot adopt a standard that effectively regulates the very same track support structure that is already regulated by the FRA, it should reject the Petitioner's proposed rule.

B. The Illinois General Assembly Has Not Delegated to the Commission the Power to Adopt the Proposed Rules.

"The [Illinois Commerce] Commission, because it is a creature of the legislature, derives its power and authority *solely* from the statute creating it, and its acts or orders which are beyond the purview of the statute are void." *City of Chicago v. Illinois Commerce Comm'n*, 79 Ill.2d 213, 217-18, 402 N.E.2d 595, 597-98 (1980) (citing *People ex rel. Illinois Highway Transp. Auth. Co. v. Biggs.*, 402 Ill. 401, 84 N.E.2d 372 (1949)) (emphasis added). In order for the Commission to adopt the Proposed Rules or any other valid walkway regulations, it must find a source of authority conferred upon it by the Illinois General Assembly.

The UTU now concedes that 625 ILCS 5/18c-7401 (2003), is not that source. Petitioner's Response Brief at 16-17. *See also* Joint Response to the Petition at 7-10. Instead, it relies exclusively on 625 ILCS 5/18c-1202 (2003), which gives the Commission the power to "[a]dopt appropriate regulations setting forth the standards and procedures by which it will administer and enforce [Chapter 625], with such regulations being uniform for all modes of transportation or different for the different modes as will,

in the opinion of the Commission, best effectuate the purposes of [Chapter 625]." The Petitioner reads this section as a delegation of "plenary power" to the Commission sufficient to authorize it to adopt the proposed rule and, presumably, whatever other rule the Commission should wish to adopt. This interpretation ignores a fundamental limitation of Section 5/18c-1202. While that section clearly gives the Commission the power to adopt regulations necessary to implement whatever authority the General Assembly has delegated to it under Chapter 625, *the substantive source of the power to regulate a particular subject matter must be found somewhere in Chapter 625.* Without such a limitation, which is clearly expressed on the face of Section 5/18c-1202, the General Assembly's delegation of authority to the Commission would be nearly limitless. This could not have been the General Assembly's intent. Otherwise, the substantive grant of regulatory power to the Commission over grade crossings and other railroad facilities found in Section 5/18c-7401, along with a significant portion of the remainder of Illinois' Commercial Transportation Law, would have been pointless. If the General Assembly had wanted to grant such open-ended authority to the Commission, it would have written Section 5/18c-1202 without limiting the Commission's rulemaking power to those matters set forth by the General Assembly in Chapter 625.

The problem with the Petitioner's proposed rule is that nothing in Chapter 625 evidences a delegation to the Commission of any authority to adopt it. The Commission's power to regulate railroad tracks, facilities, and equipment is set forth in Section 5/18c-7401. But, as the Petitioner now concedes, that Section does not confer upon the Commission the power to regulate the subject matter of the proposed rule. In fact, Subsection 2 *limits* the Commission's authority over the safety of railroad tracks to

adopting those safety standards enacted under *Federal* law. The other portions of this Section have nothing to do with tracks, ballast or walkways.

The General Assembly's delegation of power to the Commission was not always so limited. Until the end of 1985, when railroads were still defined as "public utilities" under Illinois law (*compare,* Ill. Rev. Stat. Ch. 111 2/3, para. 10.3 (1983) with 625 ILCS 5/3-105 (2003)), the Commission enjoyed broad regulatory power over the "plant, equipment or other property" of railroads in Illinois. *See,* Ill. Rev. Stat. Ch. 111 2/3, para. 61 (1983). But all of that changed when the General Assembly enacted the Commercial Transportation Law (a portion of Public Act 84-796, or the "Act"). When the Act became effective on January 1, 1986, railroads were no longer included among Illinois "public utilities." As a result, the Commission's broad power to regulate the safety of the plant, equipment or property of "public utilities" (now codified at 220 ILCS 5/8-503 (2003)) does not now apply to railroads. As described above, the legislative expression of that power is now much more limited and does not include the authority to adopt the proposed rules.

II. EVEN IF IT HAD THE POWER TO DO SO, THE COMMISSION SHOULD REFUSE TO ADOPT THE PROPOSED RULE IN ANY CASE.

The Petitioner has asked the Commission to enact the type of onerous, comprehensive walkway rule that has not been adopted anywhere in this country outside the jurisdictional limits of the Ninth Circuit Court of Appeals, where, as discussed above, the court held in a now obsolete decision that rules requiring walkways are not preempted by the FRSA. While it is true that some states outside the Ninth Circuit do have

"walkway rules," many of them apply only to bridges and trestles[3] or to industry-owned tracks,[4] and most of the others are a single sentence long and simply require that walkways be maintained "in a safe and suitable condition."[5] Tennessee's walkway rule is a bit more ambitious, but it recognizes that a statewide, one-size-fits-all rule like the one proposed by the Petitioner in this proceeding is bad policy.[6] Were the Commission to adopt the Petitioner's rule, it would be breaking new and unwelcome ground.

Although three Class-1 carriers may have agreed to a compromise version of the rule originally proposed by the Petitioner, the Commission should not read into this agreement an endorsement by these railroads of any need for the proposed rules or any purported safety benefits. Not a single one of these carriers called a witness to testify in favor of the rules. The most they have done is to file responses to the Petition accepting the compromise, and one of them expressly reserved its right to challenge even the compromise version of the rule on Federal preemption and state power grounds. *See,* Response of CSX Transportation, Inc. Any suggestion that these three carriers enthusiastically welcome new state safety regulations is simply not supported. The carriers' motives for accepting the compromise are not fully known to the Respondents or

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[3] Iowa's and New Jersey's walkway rules only apply to bridges and trestles. Iowa Code § 327F.3; N.J.A.C. § 12:185-29.1. Ohio's walkway rule is also limited to bridges, but even that regulation has been invalidated under the FRSA. *Norfolk and Western Ry. Co. v. Public Utils. Comm'n, supra.*

[4] Missouri's walkway regulations apply only to industry-owned tracks, not those owned by railroads. 4 CSR 265-8.110.

[5] The Maryland and New York require that walkways "ordinarily used by train and yardmen and other employees...be kept in reasonably suitable condition." COMAR 09.12.91.04 G(3), COMAR 20.95.02.07 B; NY CLS RR § 51-a.5. Pennsylvania requires that walkways be kept "in reasonably suitable condition". 52 Pa. Code § 33.125(b).

[6] Tennessee's walkway regulations "are to be construed not as a blanket order requiring all railroads in all circumstances to construct or reconstruct all walkways in accordance with [certain] standards, but rather as a statement of recommended practice." Furthermore, the existence of the Tennessee regulations "is not intended to imply that other practices may not be considered safe under the circumstances of particular situations." Tenn. Comp. R. & Regs. R. 1680-9-2-.04.

to the Petitioner, and they certainly are not part of the record before this Commission. If it decides to consider these rules, the Commission should look at them on their merits and not assume that those who may have agreed to go along with them did so because they thought them necessary, or even desirable.

A. There is No Evidence that the Proposed Rule will have a Positive Impact on Railroad Safety in Illinois.

The Petitioner claims that the purpose of its proposed rule is to improve safety conditions for employees who work on the ground adjacent to railroad tracks. While that certainly is a laudable goal, the Petitioner has not shown that its proposed rule will do anything to advance it. In fact, the rule might well impair railroads' ability to keep their rolling stock moving safely through Illinois.

The Petitioner's argument is that walkway rules are needed because "slip, trip and fall" type injuries are prevalent in Illinois and because remote control locomotive operations are about to be introduced in the State. Neither of these reasons is sufficient to justify a walkway rule.

i. Safety Data

The Petitioner's sole witness testified about general conditions in Illinois rail yards, noting that in some cases there is "debris, obstructions, large puddles...[and] large ballast" in areas where railroad employees regularly perform switching work. Hearing Tr. 29. He testified that it may be difficult for employees to walk in these conditions. Hearing Tr. 30. He suggested that compared to most other states conditions are "particularly bad" in Illinois, which according to statistics compiled by the FRA,

supposedly ranks among the worst of states for "slip, trip and fall" injuries. Hearing Tr. 41.

Notably absent from the Petitioner's presentation was any evidence that the proposed rules would do anything to make railroad operations in Illinois any safer. And for good reason. As their safety experts pointed out, the Respondents' incident reports corresponding to the safety data cited by the Petitioner reveal that injuries that are even remotely related to falls on walkways are steadily *declining*. Hearing Tr. 137-138; 159-162, Norfolk Southern Ex. 2. Furthermore, there is nothing in the safety data to indicate that the areas addressed by the proposed rules (ballast size, walkway slope and width, and obstructions) would lead to a further decline in injury rates. Hearing Tr. 139; 163-164. In those cases where employees complained of large ballast and it was replaced with smaller material, the railroads have seen no decline in injury rates. Hearing Tr. 139. For one of the carriers, there was no difference between "slip and fall" injury rates in yards, where smaller ballast typically predominates, and injury rates on the main line, which is generally supported by larger ballast. Hearing Tr. 164-165. In some cases, the smaller ballast has created drainage problems that may require the reintroduction of larger ballast. Hearing Tr. 140.

The most the Petitioner does to dispute this testimony is to imply that the Respondents have either mistakenly categorized or deliberately manipulated the data they report to the FRA. Petitioner's Br. 19-20. Without any apparent sense of irony, the Petitioner levels this criticism *against the very data upon which it relies in its Petition.* So it is the Petitioner's position that safety data reported by the railroads to the FRA is entirely reliable when it can be characterized to suggest that the railroads have a terrible

safety record in Illinois and that employees are literally stumbling around rail yards throughout the State, but that same data is not to be trusted when it suggests that injury rates are declining without the benefit of walkway rules and that whatever conditions exist in Illinois will not be alleviated by the Petitioner's proposal. However badly the Petitioner would like to be selective in its use of safety data, its position is not credible and it provides no basis for any rule to be enacted by the Commission.

In any event, the Petitioner's evidence of supposed "wrongdoing" by the railroads is awfully thin and outdated. There is nothing to the Petitioner's accusation of underreporting, which is entirely based on comments made by a U.S. Senator in the mid-1980s and a 14-year old General Accounting Office report. Times have changed since Senator Heinz spoke in 1987 and the GAO issued its report in 1989. Part 225 of Title 49 of the Code of Federal Regulations, which addresses railroads' reporting of accidents and incidents to the FRA, has been revised several times since then. Among those revisions was the requirement that railroads adopt internal control procedures to insure accurate reporting of injuries. *See,* 61 FR 30,940 (1996). The GAO report was addressed years ago and cannot be used to cast any doubt on safety data currently reported to the FRA.

ii. Remote Control Locomotive Operations

The Petitioner's witness also testified that the onset of remote control locomotive operations in Illinois gives rise to further need for a walkway rule because it will allegedly require the Petitioner's membership to spend more time on the ground. Hearing Tr. 47. But the Petitioner was completely unable to present *any evidence* of safety problems caused by remote control. In fact, the actual safety data suggests that there are no such problems. In Canada, where remote control locomotive devices have been in use

for some time, there has been a steady *decline* in slip and fall injuries over the past five years. Hearing Tr. 141-142; Illinois Central Ex. 3. The Petitioner tries to minimize this inconvenient fact by hypothesizing that a railroad employee with a "big stomach" might have trouble seeing the ground when wearing the remote control box. Petitioner's Response Brief 18. But the Petitioner fails to present any actual evidence of this problem, nor does it explain how its proposed regulation would solve it. The Petitioner has not made the critical link between the supposed safety problems it has identified and the content of its proposed rule.

iii. The Proposed Rule will make Railroad Operations in Illinois Less Safe.

The Respondents called witnesses who testified that, far from making the job duties of Petitioner's members and other railroad employees safer, the rule proposed by the Petitioner will actually make it more difficult for Illinois railroads to adequately maintain their tracks. The proposed rule would limit the railroads' ability to alleviate poor drainage conditions wherever walkways are required to be constructed and maintained because (i) the rule requires the use of smaller and relatively poor draining "yard ballast"; and (ii) it sets a maximum slope on the ballast.

As the Respondents' engineering witnesses testified, larger ballast drains better than smaller ballast. Hearing Tr. 112; 116; 188-189; 203, 224-225. The larger ballast is more durable, breaks down more slowly, and requires less cleaning. Hearing Tr. 113. Smaller ballast is often used in yards purely for the comfort of the employees, but the railroads need to retain the ability to replace the small ballast with larger ballast if a drainage problem develops. Hearing Tr. 118. And the railroads need to be able to move quickly in order to ensure compliance with FRA track standards. Hearing Tr. 119-120;

204. The railroads need to maintain the flexibility to place the right mix of ballast where conditions demand it. Hearing Tr. 229; 239. The Respondents' witnesses also testified that a 1:8 slope, as would be required by the proposed rule, is not the most efficient means to drain the track support structure. Hearing Tr. 196-197. A steeper slope allows water to drain more effeciently. *Id.*

Failure to ensure adequate track drainage can create a number of problems for railroads. Poor drainage often leads to the very muddy conditions about which the Petitioner complains. Hearing Tr. 56; 199. Standing water near the track is an especially serious safety problem in cold weather when ice can form. Hearing Tr. 56-57. Poor drainage can also result in the loss of track stability, creating a risk of derailment. Hearing Tr. 192; 225-226.

The Petitioner nonetheless defends its proposed rule because, at least with regard to ballast size,[7] it purports to adopt standards recommended by the American Railway Engineering and Maintenance-of-Way Association ("AREMA"). Petitioner's Response Brief at 18. But the Petitioner ignores that its proposed rule may apply in some cases to mainline tracks, for which AREMA recommends larger ballast than that required by the Petitioner's proposal. Furthermore, as one of the drafters of the AREMA guidelines upon which the Petitioner relies testified, AREMA does nothing more than *recommend* practices to the railroads. Hearing Tr. 182. The Petitioner's witness conceded this point as well. Hearing Tr. 63. AREMA recognizes that its guidelines are not the only acceptable engineering and maintenance methods and that railroads may choose to use other standards where needed. Hearing Tr. 182-184; Norfolk Southern Ex. 4. To elevate

[7] AREMA has not established guidelines for walkway slopes or widths. Hearing Tr. 196.

AREMA's guidelines to a hard and fast rule would be to undermine the ability of railroads to adapt their standards to different conditions.

The Petitioner responds that the proposed rule does provide flexibility because it allows railroads to petition the Commission for waivers when they want to deviate from the standards set forth in the rule. Petitioner's Response Brief at 18. This is a scheme that only a lawyer could love. It will invite litigation every time a railroad wants to re-ballast a section of track to alleviate a drainage problem. It will create stacks of paper as each side submits competing proposals to the Commission. It will require the Commission to decide whether a particular size of ballast is appropriate, whether a particular slope is too steep, or whether a particular obstruction is "reasonable." It will mean that rail yards in Illinois will be designed by lawyers instead of the engineers who have spent their careers building them. It will make the Commission the architect and construction manager for railroad walkways in Illinois. For the good of the industry and the Commission, the Respondents urge that this approach be rejected.

B. The Proposed Rule is Ambiguous and will be Difficult to Comply with and Administer.

The waiver scheme is not the only part of the proposed rule that will be unduly burdensome and impractical. The language of the rule is so fraught with ambiguity and uncertainty that no railroad can be completely sure that it is in compliance with it. The Petitioner loses sight of the fact that railroad facilities are constructed and maintained by engineers, whose professional training demands little tolerance for ambiguous words and phrases. James Gearhart said it best:

> Q. As an engineer, is there an engineering meaning to the phrasing of [the Petitioner's proposed] rule?

A. Well, reasonably free, how do you pin a number on that? You know, engineering people work with numbers. We work with distances and sizes and weights.

And then you talk about another issue, you say de minimus. Well, what is de minimus? That might mean something to me that it doesn't mean to you. And if you had a percentage that you could go with, that would probably be something that people would understand. But you say de minimus, that would mean more to somebody than to somebody else.

So, you know, the debate would never end about, well, what is correct and what is defective.

Hearing Tr. 231.

Mr. Gearhart cited a litany of ambiguous phrases in his testimony. Hearing Tr. 231-233. He also noted that the rule as written might apply to areas outside rail yards, including mainline track. Hearing Tr. 233. He pointed out that, depending on what "de minimus" means, the ballast standards set forth in the rule might require a change in the way his railroad handles ballasting procedures because the current method allows yard ballast and mainline ballast to mix in the same car. Hearing Tr. 235-236. All tolled, Mr. Gearhart could not even begin to calculate the cost associated with the rule because he is not sure what it would require of him. Hearing Tr. 238.

The Petitioner contends that the meaning of the words and phrases that so bother the Respondents are at least knowable because they appear in numerous cases and statutes. Petitioner's Response Brief at 21-22. The Petitioner is correct about one thing – these words do appear in a lot of cases because they are litigated endlessly. As the Petitioner well knows, reading every statute or case that has ever been printed will not yield a truly clear meaning for words like "reasonable," "de minimus" or "good faith." The drafters of the proposed rule obviously included ambiguous words *intentionally*

because no one, not even the Petitioner, can predict today exactly what conduct in the future will conform to the rule. That is precisely the problem – the railroads can never be sure how to comply with it.

The Petitioner also argues that railroads in the West are faced with similar standards and appear to have done so "without any difficulty." Nothing in the record speaks to the experience the Western carriers have had with walkway rules, and as noted above, it is only possible to speculate about the reasons three roads have agreed to a compromise version of the rule in Illinois. What is clear from the railroad witnesses who testified at the hearing is that they want no part of it.

III. CONCLUSION

Aside from being beyond the Commission's power, the rule proposed by the Petitioner is bad policy. Railroads have operated in the State of Illinois for over 150 years without it. There is no credible evidence that anyone has been injured because there has been no such rule. While the Petitioner's proposal is no doubt well-intended, no one has demonstrated that it will have any safety benefit for railroad employees, and it will, in fact, likely make their jobs more dangerous by creating more problems than it solves. The railroad industry and its employees will not be well served if they are required to divert scarce resources from programs that produce tangible safety benefits to building and maintaining unneeded walkways in Illinois.

For these reasons, the Respondents respectfully request that the Commission reject the Petition and deny any request to adopt the rule proposed by the Petitioner or any other rule governing walkways.

Dated: October 31, 2003

Respectfully submitted,

Norfolk Southern Railway Company

By: _____

One of its Attorneys

Respectfully submitted,

Illinois Central Railroad Company, Grand Trunk Western Railroad Incorporated, Chicago, Central & Pacific Railroad Company, Wisconsin Central Ltd, and Wisconsin Chicago Link Ltd.

By: _____

One of its Attorneys

CERTIFICATE OF SERVICE

I, Stephen C. Carlson, an attorney, certify that I caused a copy of the attached Joint Post-hearing Brief of Respondents Norfolk Southern Railway Company, Illinois Central Railroad Company, et. al., to be served on each of the parties listed on the service list by messenger or Federal Express this _____.

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